MOTION FILED
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No. 85-1346 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF INTER-AMERICAN FREIGHT CONFERENCE, SECTIONS A AND D

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ALLIED CHEMICAL INTERNATIONAL CORP.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Applicants, Inter-American Freight Conference, Sections A and D, respectfully move this Court for leave to file the accompanying Brief in this case as *amicus curiae*.

Consent to the filing of the accompanying brief was obtained from Francis R. Matera, Esq., attorney for the petitioner in this case. A letter dated January 23, 1986 was sent to Irving R. Storch, Esq., attorney for the respondent, requesting his consent to our appearance as *amicus curiae* on behalf of the applicants and our filing of briefs in that capacity. Unfortunately, Mr. Storch responded by letter dated January 27, 1986 that he was unable to consent to our appearance or filing of a brief.

The applicants Inter-American Freight Conference, Sections A and D have the following interests in this case:

(1) The tariff which governed the shipment in this case and was central to at least one aspect of the Court of Appeals decision below was established by applicant Section A and was filed with and regulated by the Federal Maritime Commission (FMC), and

(2) Both Section A directly and its sister Section B indirectly have interests in protecting the integrity of their tariffs from the uncertainty created by the Court of Appeals decision with respect to limitation of liability, which has placed the petitioner and other member carriers of the applicants in the impossible position of either disregarding the decision or violating the tariffs on file with the FMC.

While the petitioner has raised the issue of limitation of liability both before the Court of Appeals and in its Petition for Certiorari in this Court, it has not presented the tariff for the Court's consideration and has not brought to bear upon the argument the same perspectives which the applicants have upon the importance of preserving the clarity of the tariff provisions. In the accompanying Brief, the applicants have provided certified copies of the tariff provisions relevant to this case and have shown how their status as binding legal requirements dictates that the Court of Appeals findings on limitation of liability were incorrect.

If this Court agrees that these findings are incorrect, the decision of the Court of Appeals should be reversed or remanded for further proceedings.

We therefore request this Court to grant us leave to file the accompanying Brief as *amicus curiae*.

Respectfully submitted,

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Dated: March 12, 1986

TABLE OF CONTENTS

	PAGE
Table of Authorities	v
Interests of Inter-American Freight Conference, Sections A and D	1
Summary of Argument	3
Argument	3
Conclusion	8
Appendix	A-1

TABLE OF AUTHORITIES

Cases PAGE

Allied Chemical International Corp. v. *Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), reprinted in Petition for Certiorari, p. A-10 . . . 4, 6

Atchison, T. & S.F. Ry. Co. v. *City of Chicago*, 240 F.2d 930 (7th Cir.), *aff'd*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1957) 5

Brown & Root, Inc. v. *M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981) 4

Compania Anonima Venezolana De Navegacion v. *A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) 5

Gilbert Imported Hardwoods, Inc. v. *245 Packages of Guatambu Squares*, 508 F.2d 1116 (5th Cir. 1975) 5

John Deere & Co. v. *Mississippi Shipping Co.*, 170 F. Supp. 479 (E.D. La. 1959) 4

Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) 5

Newcomb v. *Brennan*, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977) 5

New York, N.H. & H.R. v. *Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953) 4

Statutes

Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15 . . . . . 3, 4, 6, 7

Shipping Act, 1916, 46 U.S.C. §§ 801-42 . . . . . 2, 5, 7

Shipping Act of 1984, 46 U.S.C. app. 1701-20 . . . . . 2, 5, 7

Miscellaneous

U.S. Maritime Administration, United States Oceanborne Foreign Trade Routes (1985) 8

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COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

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ALLIED CHEMICAL INTERNATIONAL CORP.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE INTER-AMERICAN FREIGHT CONFERENCE SECTIONS A AND D

The Inter-American Freight Conference, Sections A and D, as *amicus curiae*, respectfully request that this Court grant the Petition for Certiorari in this case for the reasons set forth hereinafter.

INTERESTS OF INTER-AMERICAN FREIGHT CONFERENCE, SECTIONS A AND D

The Inter-American Freight Conference (IAFC) is a non-profit organization comprised of oceangoing common carriers engaged in the transportation of cargo between ports on the

United States Atlantic and Gulf Coasts and ports in Argentina, Brazil, Paraguay and Uruguay. Its formation and operations are governed by an agreement (FMC No. 202-009648A) that has been filed with the Federal Maritime Commission (FMC) and is regulated under the Shipping Act of 1984, 46 U.S.C. app. 1701-20.[1]

The IAFC is divided into four geographically-defined Sections, each of which has been delegated with the authority to establish tariffs containing the rates, charges, rules and practices applicable to the shipments transported by the carriers which are members of the Section. IAFC Sections A and D, which are represented in this Brief, cover the southbound trades from U.S. Atlantic and Gulf ports to ports in Brazil (Section A) and ports in Argentina, Paraguay and Uruguay (Section D).

The petitioner in this case is a member of both Sections A and D, and the shipment which is the subject of this case was within the trade covered by IAFC Section A and was thus governed by the tariff established by that Section.

Since the Court of Appeals decision on the limitation of liability issue depends upon this tariff, that Section has a direct interest in this case. In addition, both IAFC Sections A and D have an interest in overturning the decision on that issue under which, as shown below, the members of the Sections would have the impossible choice either of disregarding the decision or of violating tariff provisions that have the force of law.

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1 At the time of the shipment in this case, the IAFC was regulated under the Shipping Act, 1916, 46 U.S.C. §§ 801-42. Ocean shipping was removed from that Act when the Shipping Act of 1984 was enacted. See 1984 Act, § 20(a)-(b), 98 Stat. 67, 88-89 (1984).

SUMMARY OF ARGUMENT

The Court of Appeals decision should be reversed in respect of its holding that the petitioner carrier was not entitled to the statutorily prescribed limited liability for cargo loss or damage, since the respondent shipper did not satisfy the bill of lading and tariff requirements for overcoming the limitation of liability and the tariff binds both the carrier and shipper with the force of law.

ARGUMENT

The liability of ocean carriers for damage or loss of cargo is governed by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15. Central to this carefully crafted statute is Section 4, 46 U.S.C. § 1304, which specifies the substantive defenses available to the carrier and, where such defenses are not present, provides for a limitation upon such liability in the amount of $500 per package or, as to cargo not shipped in packages, $500 per customary freight unit.

However, COGSA also affords a shipper the choice of opting out of this limitation of liability by complying with the requirements of Section 4(5), 46 U.S.C. § 1304(5), which provides in part as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

This provision has been said to be "the congressional response to Supreme Court decisions which for well over a century consistently held that only when a common carrier grants its shippers a 'fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained.' " *Brown & Root, Inc.* v. *M/V PEISANDER*, 648 F.2d 415, 420 n.11 (5th Cir. 1981), quoting *New York, N.H. & H.R.* v. *Nothnagle*, 346 U.S. 128, 135, 73 S.Ct. 986, 990, 97 L.Ed. 1500, 1507 (1953).

"The Act thus gives the shipper an option of to avoid the limitation of liability and make the carrier the insurer of the cargo. To exercise this option effectively, the shipper must declare the value of the cargo, insert the declared value in the bill of lading and pay higher freight rate." *John Deere & Co.* v. *Mississippi Shipping Co.*, 170 F. Supp. 479, 481-82 (E.D. La. 1959).

Under Clause 17 of the bill of lading covering the shipment in this case, the petitioner's liability for loss or damage to the cargo was limited to the COGSA $500 per package limitation "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the Bill of Lading *and extra freight paid*." See Court of Appeals decision below, reported at *Allied Chemical International Corp.* v. *Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 484-85 (2d Cir. 1985), reprinted in Petition for Certiorari, p. A-10, A-25 (emphasis added).

With respect to the extra freight payable, attached hereto as an appendix are four pages of IAFC Section A Tariff FMC-15, which have been certified by the Federal Maritime Commission to be the tariff pages on file and in effect at the time of the

shipment in this case (October 1980). This tariff was required to be filed with the FMC under Section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(1), as in effect at the time of the shipment. Under Section 18(b)(3) of that Act, 46 U.S.C. § 817(b)(3), the petitioner and the other carrier members of Section A were required to adhere to the rates and charges prescribed in Tariff FMC-15. Shippers were likewise constrained to follow these tariff provisions under Section 16 of the Act, 46 U.S.C. § 815.[2]

Like all regulated transportation tariffs, Tariff FMC-15 is considered to have the force of law. As this Court stated in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (citations omitted):

> Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.

See also *Gilbert Imported Hardwoods, Inc.* v. *245 Packages of Guatambu Squares*, 508 F.2d 1116, 1120-21 (5th Cir. 1975) (stating the same conclusion with respect to a tariff of the IAFC); *Compania Anonima Venezolana De Navegacion* v. *A.J. Perez Export Co.*, 303 F.2d 692, 696 n.12 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) (holding that a published tariff rate is not "a mere matter of contract" but becomes "a rate imposed by law"); *Atchison, T. & S.F. Ry. Co.* v. *City of Chicago*, 240 F.2d 930, 937 (7th Cir.), *aff'd*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1957) (declaring that a tariff is to be treated the same as a statute).[3]

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2 In 1984, ocean shipping regulation was removed from the Shipping Act, 1916, and re-enacted under the Shipping Act of 1984, which contains provisions imposing the same tariff requirements as those set forth above. See 1984 Act, §§ 8(a), 10(a)(1), 10(b)(1)-(4), 46 U.S.C. app. 1707(a), 1709(a)(1), 1709(b)(1)-(4). See also note 1 *supra*.

3 As a statutory matter, Tariff FMC-15 is properly the subject of judicial notice. *Newcomb* v. *Brennan*, 558 F.2d 825, 829 (7th Cir.), *cert. denied*, 434 U.S. 968, 98 S. Ct. 513, 54 L. Ed. 2d 455 (1977).

In this case, the commodity rate on the cargo (caprolactam) shipped by the respondent depended upon its value. For caprolactam valued at less than $2,000 per 2240 lbs. the commodity rate was $110.00 per weight ton (also 2240 lbs.); and for caprolactam valued at greater than $2,000 per weight ton the commodity rate was $131.50 per weight or measurement ton. See IAFC Section A Tariff FMC-15, p. 101, attached hereto as p. A-5. This commodity rate was reflected in the statement "Rate: $110.00 LT Value: $1657.00 LT" appearing under the column "Description of Packages and Goods" on the bill of lading. *Allied Chemical International Corp.* v. *Companhia de Navegacao Lloyd Brasileiro*, *supra*, 775 F.2d at 485, Petition for Certiorari at p. A-26-27.

The Court of Appeals held that the payment by the respondent of this commodity rate of $110.00 per ton was sufficient without payment of any additional amount to impose liability upon the petitioner beyond the COGSA package limitation:

> Caprolactam valued at less than $2,000 per long ton was charged a rate of $110 per long ton. J.App. at 165. More valuable caprolactam was charged a rate of $131.50 per long ton. *Id.* Thus, under the applicable tariff, Allied had no option to pay a higher rate. Having paid a freight charge based on the value of the goods, Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties.

Id., 775 F.2d at 486, Petition for Certiorari at p. A-28.

Far from being illogical, however, the contrary is exactly what is legally required of the petitioner and the other members of the IAFC Section A under the applicable tariff. Under the first paragraph of Rule 12 on pages 26 and 27 of the Section A tariff (Appendix pp. A-3-4 attached hereto), the carrier's liability as to the value of shipments is determined in accordance with the carrier's bill of lading. As indicated

above, the petitioner's bill of lading required that extra freight be paid in order for a shipper to recover greater than $500 per package for loss or damage to goods. The second paragraph of Rule 12 requires that "such additional liability only will be assumed by the carrier at the request of the shipper and upon payment of an additional charge of two per cent (2%) of the total declared valuation in addition to the stipulated rate on the commodities shipped as specified in this tariff." *Id.*

By holding that where the commodity rate depends upon the value of the cargo no additional amount need be paid by a shipper for coverage over $500 per package, the Court of Appeals has placed the petitioner and the other member carriers of the IAFC Section A in the position of having to violate the provisions of Rule 12 in Tariff FMC-15. This is in direct conflict with their obligations under the Shipping Act and the legally binding regulated tariff discussed above. It also defies credulity that a shipper could be held to receive a substantial insurance coverage for its cargo over and above the package limitation without the payment of any additional freight charges. It is not only unfair to the carrier, but also inequitable to shippers that have not been granted this windfall but have paid the proper ad valorem rate under Rule 12.

The statutory limitation for cargo loss or damage has been thrown into considerable uncertainty as a result of the Court of Appeals decision.[4] Such uncertainty can only be a hindrance to the promotion of U.S. trade, which is one of our major national interests. In view of the fact that the regulated or liner

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4 We have not argued the other issues raised the petitioner in its Petition for Certiorari not because we do not agree with the petitioner's positions (which we do), but because they do not call into question the integrity of the tariffs. However, the same interest of certainty in allocating risk of loss or damage between carrier and shipper has been jeopardized by the Court of Appeals in respect of the definition of a "package" for purposes of the COGSA limitation. The Court of Appeals incorrectly rejected the only number which was clearly set forth within as column on the bill of lading that was unambiguously labeled "No. of Pkgs." See Petition for Certiorari, pp. 6-9.

segment accounts for more than half by value of all U.S. ocean trade,[5] it is especially important to maintain and enforce the provisions regarding shipper and carrier rights that have been established in legally binding tariffs.

CONCLUSION

In respect of its findings as to limitation of liability, the Court of Appeals decision places the petitioner and the other member carriers of the Inter-American Freight Conference Sections A and D in the impossible position of having to violate tariffs that have the force of law in order to comply with the decision.

We therefore urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

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Counsel for Applicants
Inter-American Freight
Conference, Sections A and D

Dated: March 12, 1986

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5 U.S. Maritime Administration, United States Oceanborne Foreign Trade Routes 277 (1985).

APPENDIX

UNITED STATES OF AMERICA

FEDERAL MARITIME COMMISSION

Washington, February 26, 1986

I HEREBY CERTIFY that the annexed are true copies of 2nd Revised Title Page, Original Page 26, 1st Revised Page 27 and 11th Revised Page 101 to Inter-American Freight Conference Tariff FMC-15 in effect as of October, 1980, as they appear on file in the Federal Maritime Commission.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Maritime Commission to be affixed, on the day and year first above written.

[SEAL]

/s/ JOHN ROBERT EWERS
Secretary
Federal Maritime Commission

Inter-American Freight Conference

Section A - F.M.C. Agreement No. 3648-A
Tariff No. 8 (F.M.C. No. 15)
Cancels Tariff No. 6 (F.M.C. No. 13)

Orig./Rev.	Page
2nd Revised	Title
Cancels	Page
1st Revised	Title
Effective Date	
May 27, 1980	
Correction	800

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Local Commodity Rates for Direct or Transhipment Service

See Rule 13

for

General and Refrigerated Cargo

from

United States Atlantic and Gulf Ports

See Rule 1

to

Ports of Brazil

See Rule 21 and Outport Differential Section

Participating Carriers are listed on pages 7 to 10

Transportation under the provision of this tariff is subject to the terms of individual carrier bills of lading as shown in *Inter-American Freight Conference* Tariff No. 4 (F.M.C. No. 10). Please refer to Rule 8 herein.

All rates, rules, regulations, charges, conditions, commodity descriptions, packing requirements or any other provisions of this tariff are explicit and subject to Conference interpretation only. All questions as to application of any part of this tariff must be referred to the Conference office for determination or interpretation.

(I) Anti-rebating certification to be found in Tariff Rule 41.

This tariff is made available to the public by subscription on application to the Conference. The subscription price is $125.00 including mailing of all supplements and re-issue for 12 calendar months from effective date of subscription. Subscriptions mailed outside the United States will be $225.00 per 12 month period.

Issued by

Paul B. Thornquist
Executive Administrator
17 Battery Place
New York, N.Y. 10004
Telephone (212) 425-8075
TWX 710-581-4278

(I) In accordance with F.M.C. SPF 1025 dated April 29, 1980

ocr'd pic 5-23-00

FREIGHT FORWARDER BROKERAGE & COMPENSATION (continued)

BROKERAGE OR COMPENSATION (continued)

Compensation and/or Brokerage may not be deducted from ocean freight and other charges due in accordance with the rates and conditions contained in this tariff.

RULE 10 APPLICATION OF SURCHARGE AND/OR OUTPORT DIFFERENTIALS

For application of all surcharges, refer to page 13. For application of outport differentials, refer to page 14.

RULE 11 MINIMUM QUANTITY RATES

When two or more freight rates are named for carriage of goods of the same description over the same route and under similar conditions and the application is dependent upon the quantity of the goods shipped, the total freight charges assessed against the shipment shall not exceed the total charges computed for a larger quantity, provided, however, that the rate noted alongside a qualification specifying a required minimum quantity, either weight or measurement per container or in containers, will be applicable to the contents of the container(s), provided, the minimum set forth is met or exceeded. At the shipper's option, a quantity less than the minimum level may be freighted at the lower rate, provided the weight or measurement declared for rating purposes is increased to the minimum level.

RULE 12 AD VALOREM RATES

The liability of the carriers as to the value of the shipments at the rate provided in this tariff shall be determined in accordance with the clauses of the carrier's regular form of bill of lading.

If the shipper desires to be covered for a valuation in excess of that allowed by the carrier's regular form of bill of lading, the shipper must so stipulate in carrier's bill of lading covering such shipments and such additional liability only will be assumed by the carrier at the request of the shipper and upon payment of an additional charge of two per cent (2%) of the total declared valuation in addition to the stipulated rate on the commodities shipped as specified in this tariff.

(continued on next page)

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061 REC FMC 4-3-79

AD VALOREM RATES (continued)

Currency, specie, gold or silver bullion, precious metals, U.S. and negotiable securities will be carried at the following rates:

A) 1% ad valorem on first $25,000.00 valuation; $250.00 plus 1/2% ad valorem on excess valuation over $25,000.00 up to and including, $100,000.00; $625.00 plus 1/3% ad valorem on excess of valuation over $100,000.00.

(A) B) Minimum bill of lading charge - $80.00

C) EXCEPTION: 1/5% ad valorem on shipments of gold bullion in excess of $1,000,000.00 valuation on one bill of lading. Not subject to surcharge.

RULE 13 TRANSSHIPMENT SERVICE

Except as may otherwise be provided, rates named herein are for direct call only and bills of lading shall be issued only from and only to ports which the loading vessel actually calls. Subject to respective government regulation, no cargo shall be accepted on a transshipment basis and the issuance of through bills of lading is prohibited.

A) EXCEPTION: Cargo may be accepted on transshipment basis at direct call rates and through bills of lading may be issued to ports for which direct call rates have been established, provided, however, that the transshipment shall not be made at a port or ports in the United States of America or at ports outside the scope of the Conference Agreement.

B) EXCEPTION: For operating reasons or carrier's convenience, a carrier may, at ports within the scope of the Conference Agreement:

1) Discharge at another port and tranship to port of destination at carrier's expense; or

(continued on next page)

189 REC FMC 11-30-79

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Form A-102

Inter-American Freight Conference

Section A, Tariff No. 8 (F.M.C. No. 15)

From: United States Atlantic and Gulf Ports

To: Ports of Brazil

Orig./Rev.	Page
11th Rev.	101
Cancels	**Page**
10th Rev.	101
Effective Date	
October 1, 1980	
Correction	1053

Except as otherwise specifically indicated, rates shown herein apply to base ports of Recife, Salvador, Rio de Janeiro, Santos and Paranagua, Brazil. To other ports within the scope of this tariff, refer to the Outport Differential Section, page 14. Surcharges applicable to various ports are shown on page 13. Except as otherwise specifically provided herein, rates apply per ton of 2,240 lbs. (W) or 40 cubic feet (M), whichever yields the higher revenue. For abbreviations and reference marks, see pages 11 and 12.

COMMODITY RATE SECTION	*2%	Rate Basis	Rate
Cable, Electric, Aluminum, with or without steel core - See Aluminum Cables			
Cable, Electric, Brass, Bronze or Copper, plain or steel armored, lead covered or armored lead covered - See Copper Cable			
Cable Rings - See Rope, Wire and Steel			
CABLE, STEEL		W/M	$203.50
CALCIUM, CARBIDE		W/M	117.00
Calcium, Carbonate - See Talc			
CALCIUM CASEINATE		W/M	217.00
CALCIUM, CHLORIDE, DRY		WT.	117.00
CALCIUM CYANAMIDE, FERTILIZER or INDUSTRIAL GRADE		WT.	110.50
CALCIUM FORMATE		WT.	174.00
CALCIUM HYDROXIDE (LIME)		W/M	131.50
CALCIUM, HYPOCHLORITE		W/M	156.50
CALCIUM PHOSPHATE, DE-FLUORINATED		W/M	96.50
CALCIUM PHOSPHATE, MONOBASIC or DIBASIC		WT.	165.00
Calcium Phosphate, Natural - See Rock, Phosphate			
CALCIUM PHOSPHATES, N.O.S.		WT.	223.00
CALCIUM SILICATE, HYDRATED		WT.	229.00
CALCIUM, SILICON or CALCIUM SILICIDE, containing 20 to 35% calcium and 60 to 65% silicon		W/M	229.00
CALCIUM SILICON or CALCIUM SILICIDE, N.O.S., in hermetically sealed drums		W/M	458.00
CAMPHENE		W/M	217.00
(R) EXCEPTION: TO BASE PORTS ONLY - Flashpoint not less than 100 degrees (Fahrenheit) -- $145.50 WT. Expires: March 31, 1981			
CAPROLACTUM:			
Value not to exceed $2,000.00 per 2240 lbs		WT.	110.00
Value over $2,000.00 per 2240 lbs		W/M	131.50
EXCEPTION: TO BASE PORTS ONLY - In 20 ft. House to House containers, subject to container rental but not subject to House to House discounts. Subject to minimum weight per container 27,000 lbs. Bunker Surcharge to be assessed per weight ton -- $1,500.00 each			
(R) Expires: December 31, 1980			

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*2% ad valorem

bidding contractor that had made every feasible effort to solicit MBE participation to re-work its bid after the bids had been opened, on account of an MBE coming forward only then to indicate its interest.[14] However, Croson's bidding experience does not establish that the City has administered the Plan in this manner. As discussed in more detail supra, a local MBE claimed that Croson had not contacted him until the very day that bids were due. At that time the MBE undisputedly indicated his desire to participate, and continued to do so through the time that Croson requested a waiver. The City's denial of Croson's request for waiver in such circumstances does not establish how the City would respond to a request for waiver where a non-MBE contractor is unable to find any MBEs to participate after undisputedly making every feasible

effort to do so, and an MBE comes forward only after the bids have been opened.

Plaintiffs' final objection to the Plan's waiver mechanism is that there is no adequate appeals procedure when a request for waiver had been denied. The court rejects this objection for the following reasons. First, plaintiffs cite no authority for their contention that an appeals procedure is a sine qua non for a valid waiver mechanism in a minority set-aside program. The point of the waiver mechanism for equal protection purposes is to ensure that the minority set-aside program be sufficiently flexible that it is not applied unfairly whose its remedial goals cannot be met. To be sure, an appeals procedure for decisions about waivers may provide some additional assurance that the waiver decision is correctly made. But plaintiffs have not shown, and this Court

is not persuaded, that the availability of an appeals procedure for waiver determinations is essential for equal protection purposes.

But assuming that the availability of an appeal procedure is constitutionally significant, plaintiffs have not shown that the City's procedure is inadequate. The City has a procedure by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. City Code Ch. 24.1, Art. VII(C). There is no reason why a disappointed low bidder whose request for waiver is denied cannot protest this denial under Article VII(C), once the City decides to award the contract to some other bidder. It may be that such a protest is not available where the City decides to re-bid a contract instead of award it to another bidder.[15] But even if a protest does not

lie where the City decides to re-bid the contract, it should not amount to a constitutional defect--at least where there is no showing that the City is using its authority to re-bid contracts so as to convert the 30% MBE participation goal into an inflexible requirement.[16]

c. Consideration of Alternative Remedies.

Plaintiffs also argue that the Plan is unconstitutional because the Council did not consider the efficacy of alternative remedies. The Court does not find any deficiency in this respect, however. Despite federal, state, and local assistance of various kinds to minority businesses, minority businesses participated in miniscule proportions as prime contractors in the City's construction contracts from 1978 to 1983. Some of those methods of assistance were

explicitly referred to at the hearing. See Transcript of Hearing at 10 (remarks of Mr. Deese). The council members were no doubt also aware of other governmental efforts at various levels to promote minority business development. The plan was both criticized as too drastic, see id. at 48 (remarks of Mr. Kemp), and praised as essential if reasonable levels of minority participation in the City's construction contracts were to be a reality in the near future. See id. at 49 (remarks of Mr. Richardson). All this indicates that the City Council considered the efficacy of alternative responses to promoting greater minority business participation in the City's construction contracting--and rejected them. While plaintiffs assert that the City's consideration of alternatives was inadequate, the only authority they assert for their position is a remark by

Justice Powell in Fullilove that merely identifies the "efficacy of alternative remedies" as a factor to be considered in reviewing race-conscious remedial programs. See Fullilove at 510. As the City notes, no court has yet struck down a minority set-aside program on the ground asserted.

d. Duration of the Remedy.

Justice Powell identified the duration of the minority set-aside program as another factor to be considered in evaluating its validity. Fullilove, supra, 448 U.S. at 510. The City's Plan is scheduled to expire on June 30, 1988--just over five years after its initial adoption. Plaintiffs do not assert that the Plan's duration is unreasonable, and the Court does not find it so.

e. Effects on Innocent Third Parties.

Justice Powell also emphasized in Fullilove that a minority set-aside program should not be approved without considering its effects on innocent third parties. Plaintiffs argue that the effects of the Plan on innocent third parties render it invalid. This factor identified by Justice Powell has not been established as an essential part of the judicial review, for equal protection purposes, of a minority set-aside program. But even if it were, the City's Plan does not appear to be invalid on account of it. The burdens that the Plan may impose on innocent third parties are primarily the following: the burden on non-MBE prime contractors of seeking out MBEs to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's

construction subcontracting business but for the City's Plan.

Both burdens would seem acceptable, even in Justice Powell's view. The City's construction projects are only some fraction of the overall construction market in the Richmond area, so that non-MBE contractors would hardly be overwhelmed by having to seek out MBE subcontractors in order to compete for City construction contracts. Similarly, non-MBE subcontractors would only be precluded from thirty percent of a fraction of the overall construction market in the area, assuming that the 30% MBE subcontracting goal is met in every contract. Plaintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitutional matter. Indeed, they concede that no court yet has struck down a minority set-aside

program on the ground that it imposes an impermissible burden on innocent third parties.

f. Overinclusiveness.

i. Geographic Limitations.

Plaintiffs' final set of objections to the constitutionality of the Plan focus on three types of overinclusiveness. First, plaintiffs point out that the Plan does not impose any limitation as to where an MBE must be located in order to participate in the Plan. They argue that this renders the Plan impermissibly overinclusive because it allows MBEs outside the Richmond area to become beneficiaries of the Plan. In support of this point, plaintiffs note that several other minority set-aside programs challenged in the courts have included geographic limitations. See, e.g., Arrington v. Associated General Contractors, supra, 403 So. 2d at 897.

But they do not cite, nor has the Court found, any case holding a minority set-aside program to be impermissibly overinclusive because of the lack of any explicit geographic limitations; nor does this Court find the lack of geographical limitations in the instant case permissible.

The Court notes that plaintiffs have not shown that contractors have in fact been required to subcontract to distant MBEs in order to satisfy the requirements of the Plan. Further, as the City points out, if the Plan had limited participants based on explicit geographic boundaries, it may have been subject to challenge under the Privileges and Immunities Clause. See United Building and Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden, ____ U.S. ____, 52 U.S.L.W. 4187 (Feb. 21, 1984). Finally,

even assuming that MBEs outside the ordinary Richmond construction contracting area occasionally participate as MBEs under the Plan, no impermissible overinclusiveness would result. A minority set-aside program need not employ means that absolutely guarantee that only those MBEs intended to participate will in fact participate. Rather, there must be a "reasonable assurance" that the application of the MBE program will be limited to accomplishing its remedial objectives. Fullilove, supra, 448 at 489. The Plan does not need an express geographic limitation to provide such reasonable assurance. Indeed, an arbitrary geographic limitation could actually prevent a minority set-aside program from fulfilling its remedial purposes by excluding minority businesses that happen to fall outside the arbitrary geographic

boundaries, but that nevertheless were discriminated against in the contracting out of City construction projects.

ii. MBEs Not Actually Disadvantaged.

Plaintiffs also complain that the Plan is overinclusive because it may allow MBEs that are not economically or socially disadvantaged to participate in its benefits. They argue that the Plan must have a complaint procedure to prevent unjust participation by minority firms whose access to public contracting has not been impaired by illegal discrimination. The City does not deny that the Plan has no procedure for inquiring into the present effects of past discrimination on particular MBEs.

The Court rejects this challenge, however. It is true that the Chief Justice noted in Fullilove that the minority set-aside program upheld in that

case included a "complaint procedure...to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination" Fullilove, supra, 448 U.S. at 482.[17] But the Chief Justice did not purport to find that such a complaint procedure is essential in order to avoid impermissible overinclusiveness. Indeed, part of the Chief Justice's opinion expressly addresses the objection of overinclusiveness arising from the possibility that specific MBEs may receive benefits that cannot be justified "as a remedy for the present effects of identified prior discrimination." Id. at 486. In addressing this objection, the Chief Justice did not find it necessary that there be a way to exclude the specific MBEs that are not suffering

present effects of past discrimination. Id. at 486-89. Instead, he noted that "spurious minority-front entities can be exposed." Id. at 488. Thus, preventing participation by sham MBEs, rather than rooting out individual MBEs that do not manifest present effects of past discrimination, appears to be the relevant consideration in the Chief Justice's view.

One of the guiding principles that the Chief Justice sets out in Fullilove is that "a program that employes racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Fullilove, supra, 448 U.S. at 480. Plaintiffs in effect argue that equal protection requires any minority set-aside program to provide for individualized inquiry to ensure that

only MBEs actually suffering present effects of past discrimination are benefited through the program. This is more than narrow-tailoring, however; it is a strait-jacket. Plaintiffs have not persuaded the Court that Fullilove and the Equal Protection Clause require a remedial program to meet this standard.

The Court also notes that the Court of Appeals for the Sixth Circuit expressly rejected an identical overinclusiveness challenge to the State of Ohio's minority set-aside program. That court squarely held:

> The fact that individual minority enterprises may not be able to establish that they have suffered economically from past practices of discrimination is of no importance.

Ohio Contractors Ass'n v. Keip, supra, 713 F.2d at 174. Without making reference to Fullilove, the Court of Appeals cited the opinion of Justices Brennan, White, Marshall, and Blackmun in

Bakke for the proposition that "it is enough that each recipient [of preferential treatment] is within a general class of persons likely to have been the victims of discrimination." Bakke, supra, 438 U.S. at 363.

As discussed supra, the Chief Justice does suggest in Fullilove that, in his view, a minority set-aside program must include reasonable assurances that sham MBEs will not participate. Fullilove, supra, 448 U.S. at 488. The Plan provides such assurance. It requires the HRC to verify that any MBE submitted to meet Plan requirements is a "minority-owned and controlled business." Procedure ¶9 (emphasis original). A decision either verifying or disapproving the MBE status of a firm is ultimately subject to further review, once the City awards the contract or announces a decision to award the contract. At that

point, a disappointed bidder can protest the disapproval of its own MBE or the verification of another MBE, through the protest procedures available under the City's general procurement ordinance. See Richmond, Va. Code Ch. 24.1, Art. VII(C). There are, then, ample assurances that sham MBEs will be properly excluded. Thus, the Plan satisfies any valid overinclusiveness concerns about unjust participation by MBEs.

iii. Minority Groups Not Disadvantaged in Richmond.

Finally, plaintiffs complain that the Plan is overinclusive because it may benefit members of minority groups who have not been victims of discrimination in the construction industry in the Richmond area, such as Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.[18] Plaintiffs assert that the only evidence

presented before City Council concerned blacks.

The Court of Appeals for the Sixth Circuit rejected an almost identical challenge in Ohio Contractors, supra, 713 F.2d at 174. This Court likewise rejects plaintiffs' challenge here. First, the Court notes that the evidence before the City Council reflected limited participation (0.67%) by "minority" contractors in City construction contracts, and compared that participation with the City's "minority" population (50%). While the Court takes judicial notice that blacks are by far the largest racial/ethnic minority in the City, and were thus unquestionably severely underrepresented in City contracting, the participation of minorities besides blacks may have been similarly limited in relation to their proportion of the City's population.[19]

Further, when Congress passed the minority set-aside program upheld in Fullilove, it had concluded that participation in the construction industry by members of all these minority groups has remained limited, due to the continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 487, n. 73.

The Court sees nothing overinclusive, from a remedial standpoint, about allowing members of such groups who may now be in the Richmond area to participate in the Plan, even though the past discrimination limiting their participation in the construction industry may have occurred elsewhere. Indeed, the past discrimination that affected many of the black MBEs in the Richmond area may have occurred in Atlanta or New York rather than in the Richmond area, but plaintiffs

do not suggest that such MBEs should therefore be excluded.

D. Refusal to Grant Croson's Request for Waiver and Request for Appeal.

Croson has alleged that the City's refusal to grant Croson's request for waiver and denial of Croson's request to appeal was arbitrary and capricious, and denied Croson due process of law under both the Fourteenth Amendment of the United States Constitution and Article One, Section Eleven of the Virginia Constitution. Croson has not referred to the state constitutional due process claim in any of its materials filed after the complaint, however; the Court shall treat that basis of the claim as abandoned.

As for the federal procedural due process claim, the requirements of procedural due process apply only to the

deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). Croson has not even attempted to articulate the nature of any protected property interest it may have. The Court notes, however, that Croson was never awarded the contract at issue, and that the City in its procurement ordinance reserves the right to reject any or all bids or proposals in whole or in part if it is in the City's best interest to do so. See Richmond, Va. Code Ch. 24.1, Art. III (10)(c). Consequently, whatever property interest Croson may have would appear to be quite narrow.

A recent case provides some guidance on the possible property interests arising out of municipal bidding procedures. In Three Rivers Cablevision

v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980), a bidder on a municipal contract made procedural due process claims. The court noted the City's authority to reject all bids, id. at 1130, but proceeded to find a narrow property interest: the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the City decided to make an award. Id. at 1131. The process due such an interest, that court found, was the nonarbitrary exercise by the city of its discretion to make the award. Id.

As a threshhold matter for such an interest to exist, the party claiming deprivation of due process must be the lowest responsible bidder and in full compliance with the contract specifications. See Three Rivers Cablevision, supra, 502 F. Supp. at 1131.

One of those specifications in the City's Plan is, of course, that a contractor on a city construction project must subcontract 30% of the work to an MBE subcontractor, unless it establishes that MBEs are unwilling or unavailable to perform the work. The city reasonably determined that an MBE was available to fulfill the 30% requirement in the jail plumbing fixtures project on which Croson had bid. Indeed, the City twice determined that this was the case. Before making its first determination, the City had received work from Brown stating that his firm, Continental, was an MBE available to supply plumbing fixtures for the project on which Croson had sought waiver. The City's contract officer verified that Continental was on a state listing of MBEs that perform such work. Croson's request for waiver merely stated that Continental was

"unqualified." There was nothing unreasonable about the City's denying Croson's first request for waiver, on November 2, 1983, under these circumstances. Croson renewed its request for waiver after being informed of the City's denial. In support of its renewed request, Croson argued in a letter that Continental could not in fact supply the necessary materials because it had not established the requisite business relationships with the materials manufacturers; it also claimed that Continental had untimely provided a quote, and that the quote was higher than other quotes Croson had received. Continental represented that it could indeed supply the materials and that it did have the requisite business relationship with the manufacturer to do so. Continental also claimed that Croson had not contacted Continental until the

day the bids were due. At the City's request, Croson later submitted information about the extent to which using Continental on the project would increase the project costs. Faced with this information, the City decided on November 18, 1983 to deny Croson's renewed request for waiver because an MBE was available, and to re-bid the project, inviting Croson to submit a new bid. This decision, like the City's first decision to deny Croson's request for waiver, was not unreasonable.[20]

Almost three weeks later, Croson's counsel by letter sought to exercise Croson's "right of review" of the City's denial of its request for waiver, although it did not specify the legal authority for its right of review. The city refused; it had elected to re-bid the project, and informed Croson that there is no right to an appeal of such

decisions. Plaintiffs have not shown that any appeal of the City's decisions to re-bid projects is available.[21] Thus, the City's refusal to give Croson any further consideration of the issue of waiver, after deciding to re-bid the project, was in accordance with its rules. In sum, there was nothing arbitrary or capricious about the City's repeated denials of Croson's request for waiver or about the City's refusal to hear Croson's appeal of that denial. Further, because Croson has failed to establish that it was in full compliance with all the requirements of the contract, it had no protected property interest entitled to procedural due process.

E. Denial of MBE Status to Mega's Subcontractor Taylan.

Mega complains that the City improperly denied MBE status to Taylan,

one of the MBEs submitted in connection with its bid. Mega contends that the City improperly inquired into whether Taylan, the MBE at issue, was 51% minority controlled. Mega apparently believes that this test is improper because it does not mirror the language of the Plan itself. In order for a stock corporation to qualify as an MBE, the Plan requires that "at least fifty-one percent of the stock" be owned and controlled by minority group members. Richmond, Va. Code Ch. 24.1, Art. I (Part B)(27.10). Mega points out that Taylor, a black man, owned 51% of Taylan's stock. Apparently Mega believes that it is inappropriate for the City to inquire into whether a stock corporation's business is minority controlled; the only relevant inquiry in Mega's view is whether 51% of the corporation's stock is minority controlled.

There is no dispute that the City focused on whether Taylan as a business is "minority owned and controlled," rather than whether Taylan's stock is "owned and controlled" by a minority. Indeed, the DGS regulations implementing the Plan call for this inquiry. See Procedure ¶9. The Plan authorizes the Director of DGS to promulgate rules and regulations to implement DGS regulation requiring an inquiry into the minority control of the business itself, rather than the stock of the business, is not unauthorized by or inconsistent with the Plan. The Plan evinces the City's concern that MBEs participating in the Plan be majority-controlled as well as majority-owned. The City amended the Plan precisely for this purpose several months after enacting it, adding to the Plan's definition of "minority business enterprise" the requirement of minority

control. See Richmond, Va., Ordinance to Modify the Definition of "Minority Business Enterprise, etc., 83-127-116, § 1 at 6 (June 20, 1983). It is true, of course, that the ordinance states that a stock corporation qualifies as an MBE where 51% of the stock is owned and controlled by minority group members. But the City Council's obvious purpose behind adding the "control" requirement was to ensure that any business participating in the Plan as an MBE would not be a sham, nominally owned by minority group members but in fact controlled by non-minorities. The fact that the Plan specifies that stock corporations must have 51% of their stock owned and controlled by minority group members was surely not designed as a way to allow businesses that are not actually controlled by minorities to participate in the Plan. Rather, it reflects the

assumption that if 51% of the stock of a business is owned and controlled by minorities, then a majority of the business itself is controlled by minorities. Thus, it is not inconsistent with the Plan for City authorities, in administering it, to make their determination about a firm's MBE status based on an inquiry into minority control of the business as well as minority control of the business's stock, even where the business is a stock corporation.

The City reasonably concluded that Taylan was not 51% controlled by minority group members. When the City made its decision, it knew that Taylan was a new company. It had reliable evidence that--of all of Taylan's management functions--minority control was only exercised in the areas of personnel selection and job supervision. Taylor

himself had no business experience with respect to purchasing, bid preparation, sales, and all financial matters; he was responsible in name only for these areas. In addition, although Taylor was the majority owner of Taylan, his stock was financed entirely by a loan from Mega--his employer. The City did not err in concluding that Taylan, as a business, was not 51% controlled by minority group members.

Indeed, the evidence is such that the City reasonably could have concluded that 51% of the stock, as well as 51% of the business entity itself, was not controlled by a minority. Although Taylor nominally owned 51% of Taylan's stock, the purchase was totally financed at Mega's suggestion by a loan from Mega. For the loan, Taylor gave to Mega a note that was payable on demand and was secured by the stock certificate. While

the agreement pledging the stock certificate as security did state that Taylor retained all rights of ownership, Mega possessed the power effectively to force Taylor to surrender his ownership if he did not comply with Mega's wishes. Not only was the note payable on demand, but Taylor was an employee of Mega's. Had he sought to pay off the loan in order to exercise independent control of his Taylan stock, Mega had the power to terminate Taylor as a Mega employee.

Finally, the Court notes that whatever "rights of ownership" Taylor retained under the pledge agreement are minimal. Taylor theoretically could have sold his Taylan stock, but there would be little if any market for the stock of a new, close corporation, especially where the stock secured a loan. Taylor also was theoretically entitled to share in Taylan's profits according to his

ownership. But Taylan was not earning any overall profit in which Taylor could be expected to participate. Finally, Taylor theoretically could vote his stock (or wield his voting power) to affect Taylan's management policies. But every indication is that Taylor had no role whatsoever in Taylan's long-term management decisions, and only a minor role in Taylan's day-to-day management.

Thus, the City's decision that Taylan is not an MBE (and, therefore, that Mega had not satisfied the Plan requirements) is reasonable, whether the standard for determining a stock corporation's MBE status is minority ownership and control of 51% of the business, or minority ownership and control of 51% of the stock.

F. Federal Statutory Claims.

All the parties agree that plaintiffs' federal statutory claims--42

U.S.C. §§ 1981, 1983, and Title VI, 42 U.S.C. § 2000d--cannot be the basis of a violation unless plaintiffs also establish a violation of the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to the Title VI claims. See Fullilove, supra, 448 U.S. at 517 n.1 (opinion of Brennan, J.). It is also true of plaintiffs' claims under Sections 1981 and 1983, which are predicated on the assumption that the City has denied to plaintiffs their federal constitutional rights. Because the Court has found no constitutional violations, these claims also are denied.

IV. Conclusion

For the reasons discussed above, the Court concludes that all of plaintiffs' challenges to the Plan must fail. The City has moved for an award of its attorneys' fees in both cases under 42

U.S.C. § 1988. These motions will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

FOOTNOTES

[1]The Plan as it now stands was actually passed pursuant to two ordinances. The first ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. See Richmond, Va., Ordinance No. 83-69-59 (April 11, 1983). It was in the nature of an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been adopted five months earlier. See Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982). The Plan was amended several months after its adoption, changing the definition of minority business enterprise to require control as well as ownership by minority group members. Ordinance No. 83-127-116, § 1 at 6 (June 20, 1983).

[2]This requirement is also satisfied when the contractor itself is an MBE. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A).

[3]The rules promulgated by the Director of DGS governing waivers are embodied in two documents. The first is titled "Purchasing Procedure No. 61" ("Procedure") (attached as Appendix A). The second is titled "Contract Clauses, Minority Business Utilization Plan, Thirty Percent (30%) Award Requirement for Construction") ("Contract Clauses") (attached as Appendix B). As established in these two documents, the waiver process involves DGS and the City's Human Relations Commission (HRC).

Prospective bidders on projects covered by the Plan are notified of the Plan and its waiver provisions at the outset of the bidding on a particular project. They receive in their bid package a copy of Contract Clauses, which informs them that the contract being bid is covered by the Plan, and also explains the Plan and the provisions for waiver. See Procedure ¶2. Prospective bidders also receive in their bid package a "Minority Business Utilization Committment Form" ("Commitment Form"), on which to indicate how they intend to meet their 30% MBE requirement. Contract Clauses list names and telephone numbers of agencies that are available to provide a prospective bidder with assistance in locating an MBE. See Contract Clauses ¶C.

After the close of bidding, DGS opens the bids and determines the apparent low responsive bidder. If that bidder requests a waiver, DGS forwards the request to HRC. Procedure ¶¶5-7. HRC reviews any request for waiver and returns it to DGS with a written explanation for its action. Procedure ¶¶10-12. DGS must then "approve or disapprove waiver, if required." Procedure ¶14.

[4]The protest must be submitted no later than ten days from the date of the award or announcement of the decision to award, whichever comes earlier. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).

[5]In any case, whatever telephone contacts did occur on September 30 were

brief--from one minute (2 calls) to four minutes (one call), according to telephone billing records. Bonn was not especially helpful to the MBEs he contacted: at least one requested bid specifications, which Bonn declined to provide, although Bonn did inform him about how those specifications could be obtained. Bonn asserts that it is industry custom for the subcontractor to obtain the bid specifications, although the bid clerk of one of the MBEs that Bonn contacted gave contrary testimony in a deposition.

[6]The two provisions are Va. Code § 11-37(5)(Supp. 1984) (requiring public contracts to be awarded to the lowest responsive and responsible bidder), and Va. Code § 11-44 (Supp. 1984) (prohibiting racial discrimination in public contracting).

[7]The exemption reads, in pertinent part:

> ...the provisions of this Act also shall not apply, ... to any county, city, or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles...

Va. Code § 11.35(D)(Supp. 1984).

The statute also requires that any alternative policies and procedures be "generally applicable to procurement of goods and services by such governing body and the agencies thereof," see id. Further, the statute provides that certain provisions of the Procurement

Act--those specified in Section 11-35(E)--cannot be avoided by a local government through the adoption of an alternative procurement plan. See id. Plaintiffs do not contend that the City's procurement plan is not "generally applicable" or avoids any unavoidable provisions of the Act specified in Va. Code § 11.35(E).

[8] Plaintiffs do not argue that the Plan is forbidden by this section. Although plaintiffs did make such an allegation in their complaints, they have since withdrawn that contention, because they recognize that even if it were construed as they would have it, Section 11-44 is not applicable to local governments that have chosen to adopt their own procurement procedures. See Va. Code § 11.35(D), (E).

[9] As with Section 11-44, Section 11-48 does not apply to a public body that chooses to adopt its own procurement procedures. See Va. Code § 11.35(D), (E).

[10] The United States Supreme Court upheld a federal minority set-aside program in Fullilove v. Klutznick, 448 U.S. 448 (1980). Virginia did not pass the Act until 1982. See 1982 Va. Acts Ch. 647.

[11] Those five factors are: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the extent of minority business involvement required by the remedial program and the percentage

of minority group members in the relevant population or work force; (iv) the availability of waiver provisions; and (v) the effect of the set-aside upon innocent third parties. Fullilove supra, 448 U.S. at 510-14 (Powell, J., concurring).

[12]See, e.g., South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), appeal pending; Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981, vacated, 457 U.S. 594 (1982) (vacated for failure to reach merits of state statutory issue before deciding federal constitutional claim); Southwest Washington Chapter, Nat'l Electrical Contractors Ass'n. v. Pierce County, 667 P.2d 1092 (Wash. 1983); Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied., 455 U.S. 913 (1982).

[13]See supra note 11.

[14]The court does not hold, however, that such a procedure would render a minority set-aside program unconstitutional. Non-MBEs were required to bear substantial burdens in terms of seeking out and assisting MBEs in the minority set-aside program upheld in Fullilove. See 448 U.S. at 492-93.

[15]When Croson sought to appeal the denial of waiver, the City represented in a

letter that it was a moot issue because the City had decided to re-bid the contract and that the City's decision to re-bid cannot be appealed. In this litigation, however, the City has also represented that Croson's request for appeal the denial of waiver was too late.

[16]The City's decision to re-bid the jailhouse fixtures contract on which Croson had bid does not establish that the City has used its authority to re-bid so as to convert the 30% goal into a rigid requirement. When it decided to re-bid the project, the City had reasonably determined that Croson's request for waiver should be denied, as discussed infra. Given the controversy between the MBE and Croson, the fact that Croson was the only contractor to bid on the contract, and the fact that Croson's request for waiver was reasonably denied, the City's decision to re-bid the contract was a reasonable response to the situation. The City invited Croson to rebid.

[17]It is noteworthy that the administrative guidelines to which Chief Justice Burger referred in this remark, while they do provide a mechanism for complaints about "unjust participation," do not define unjust participation in terms of participation by MBEs whose access to public contracting has not been impaired by the effects of prior discrimination. See id. at 495 (Appendix to Chief Justice Burger's opinion).

[18]There is no evidence that MBEs composed of members of these minority

groups actually have participated in the Plan.

[19]None of the parties has adduced evidence on the proportion of each specific minority group in Richmond's general population or the extent of each group's participation in the City's construction contracts.

[20]Croson has not persuaded the Court with any of the additional evidence it has adduced--after full discovery--that Continental was in fact unavailable, or was taking advantage of the Plan to charge excessive prices. Thus the City's decision was not only reasonable, but appears to have been absolutely correct.

[21]The City has indicated that appeals of denials of requests for waiver are governed by the procedures applicable to a protest of award or decision to award, which must be filed within ten (10) days of the award or the announcement of decision to award. See Richmond, Va. Code Ch. 24.1, Art. VII(C). Assuming this is the appropriate mechanism for appealing a denial of a request for waiver, Croson clearly was untimely.

Article VII(A) of the City Code provides 30 days for appealing where any bidder, offeror, or contractor is "refused permission to, or disqualified from, participating in public contracts." Richmond, Va. Code Ch. 24.1, Art. VII(A). Croson has suggested in its briefs that this is the applicable appeal provision where the City denies a request for

waiver, and that its appeal was therefore not untimely. Even if Croson is correct on this point, the fact remains that the City had elected to rebid the contract, mooting Croson's appeal.

AN ORDINANCE No. 83.69-59

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982) of the Richmond City Code of 1975, as amended; to add definitions of "Minority Business Contractor" and "Minority Group Members", and to add in said chapter a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan."

Patron - Mr. Richardson and Mr. Marsh

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

2. Brand name specification. A specification limited to one or more items by manufacturers' names or catalog numbers.

3. Brand name or equal specification. A specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance, and other salient characteristics needed to meet City requirements and which provides for the submission of equivalent products.

4. Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

5. Change order (unilateral). A written order signed and unilaterally issued by the Director of General Services directing the contractor to make changes which the "changes" clauses of the contract authorize the Director of General Services to order without the consent of the contractor.

6. City Manager of the City of Richmond, Virginia.

7. City. The City of Richmond, a municipal corporation chartered by the General Assembly, Commonwealth of Virginia.

8. City Council. The City Council of the City of Richmond, Virginia.

9. The Director. The Director of General Services of the City of Richmond.

10. Confidential information. Any information which is available to an employee only because of the employee's status as an employee of this City and is not a matter of public knowledge or available to the public on request.

11. Construction. Building, altering, repairing, improving or demolishing any structure, building or road or street highway, and any draining, dredging, excavation, grading or similar work upon real property.

12. Construction management contract. A contract in which a party is retained by the City to coordinate and administer contracts for construction services for the benefit of the City, and may also include, if provided in the contract, the furnishing of construction services to the City.

13. Contract. All types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

14. Contract modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provision of any contract accomplished by mutual action of the parties of the contract.

15. Contractor. Any person, company, corporation, or partnership having a contract with the City or a using agency thereof.

16. Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

17. Cost data. Factual information concerning the cost of labor, material,

overhead, and other cost elements, which are expected to be incurred, or which have been actually incurred by the contractor in performing the contract.

18. Cost-reimbursement contract. A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this ordinance, and a fee or profit, if any.

19. Direct or indirect participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

20. Disadvantaged business. A small business which is owned or controlled by a majority of persons, not

limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

21. Emergency Purchases. The director may authorize or order the expenditure of funds for the emergency purchases of supplies, materials, equipment and contractual services for the using agencies without recourse to competitive bidding whenever due to circumstances, accidents or failure of mechanical equipment, the purchase of supplies, materials, equipment, and contractual services are essential to protect and preserve the interests of the city and its inhabitants, the proper functioning of the city government and the efficient rendering of public services.

22. Employee. An individual drawing a salary or wages from the City whether elected or not; any non-compensated individual performing personal services for the City or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of this City and non-compensated individual serving as an elected official of the City.

23. Goods. All material, equipment, supplies, printing and automated data processing hardware and software.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned by minority group members.

27.20. Minority Group Members. Citizens of the United States who are

Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union, committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and

empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in

all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small Business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Chapter 24.1 of the Richmond City Code of 1975, as amended, be amended by adding therein a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan," as follows:

ARTICLE VIII-A

Minority Business Utilization Plan

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

B. Rules and Regulations

The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. Article Remedial; Effective through June 30, 1988

This article is remedial and is enacted for the purpose or promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

AN ORDINANCE No. 83-127-116

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982), as amended (Ordinance No. 83-69-59, adopted April 11, 1983) of the Richmond City Code of 1975, as amended, to modify the definition of "Minority Business Enterprise" and to amend and reordain Article VIII-A, "Minority Business Utilization Plan", Part A to include within covered contracts the following "purchase of supplies, materials and equipment, contractual services, contracts of insurance and security bonds."

Patron - Mayor West

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

Article I

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned and controlled or fifty-one per cent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned and controlled by minority group members.

27.20. Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union,

committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created

by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of euqipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or

subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Article VIII-A, Minority Business Utilization Plan, section A, Covered Contracts, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

ARTICLE VIII-A

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

The City of Richmond in awarding contracts to its contractors, including suppliers, for the sale and furnishing of supplies, materials and equipment, for providing contractual services, and for writing and furnishing policies of insurance and surety bonds in which the City of Richmond is the principal insured or party for whom such bond is written and for which policy of insurance or bond the premium charged is billed to the City of Richmond, shall strive to obtain a

minimum of twenty per cent of same from minority business enterprises in the annual aggregate expenditure for such contracts and services.